IN THE

# Supreme Court of the United States

OCTOBER TERM 1977

No. 77-217

Court of Appeals No. 76-2573

ROBERT P. BAGERIS, Petitioner

vs.

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Robert P. Bageris, by his attorneys, Ivan E. Barris and Michael H. Golob, respectfully prays that a Writ of Certiorari issue to review the Judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit on May 24, 1977, and the Order denying the Petition for Rehearing entered on July 1, 1977.

### OPINIONS BELOW

The Judgment and Commitment of the United States District Court for the Eastern District of Michigan, Southern Division, is unreported, but is set forth hereinafter (Appendix A *infra*). The Order of the United States Court of Appeals for the Sixth Circuit affirming the conviction is unreported, but is set forth hereinafter (Appendix B

*infra*). The Order of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing is unreported, but is set forth hereinafter (Appendix C *infra*).

## JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit affirming the conviction was entered on May 24, 1977; the Order denying the Petition for Rehearing was entered on July 1, 1977. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

### I

Does the Government have the duty to warn a criminal defendant prior to the taking of a personal history questionnaire during the booking process that any answers given by the defendant to specific questions on the personal history questionnaire can be used by the Government in its case in chief at trial?

### II

Does the admission of testimony concerning the defendant's refusal to sign the waiver of right sheet after being warned of his constitutional rights constitute a violation of the privilege against self-incrimination pursuant to the Fifth Amendment of the United States Constitution?

## STATUTE INVOLVED

21 United States Code 841 (Appendix D *infra*).



## STATEMENT OF THE CASE

This case arose from the execution of a Search Warrant at the apartment of Petitioner, Robert P. Bageris (hereinafter referred to as Bageris), on September 19, 1974. On September 19, 1974, Agent James Stepp of the Drug Enforcement Administration signed an Affidavit in Support of a Search Warrant based upon information which was purportedly given to Stepp by a confidential informant of the Drug Enforcement Administration. On the basis of the Affidavit of Agent Stepp, a Magistrate from the United States District Court for the Eastern District of Michigan issued a Search Warrant for the premises which Bageris was occupying.

After Stepp had obtained the Search Warrant, a "raiding party" was formed which included Stepp, Agent Louis Antonucci, and several other agents of the Drug Enforcement Administration. The raiding party then proceeded to Bageris' apartment located in the City of Southfield, and when they arrived at the door to Bageris' apartment, Agent Stepp proceeded to batter the door with a ram after he purportedly announced his presence. After the agents ultimately gained entrance into the apartment, a search ensued for controlled substances and the paraphernalia associated therewith.

At the conclusion of the search of Bageris' apartment, various suspected controlled substances were seized and Bageris was placed under arrest to be taken to the Federal Building in Downtown Detroit for booking, processing and other arrest procedures. After the raiding party had returned to the offices of the Drug Enforcement Administration in the Federal Building in Downtown Detroit, Agent Antonucci, in the presence of Agent Turner, orally read

Bageris his constitutional rights, not for the purpose of taking the personal history questionnaire, but in order to see whether Bageris wished to make a statement to the agents. After Agent Antonucci had orally read Bageris' constitutional rights, the agent then handed Bageris the printed form containing the constitutional rights. After the form was presented to Bageris, Bageris stated that he had nothing to say and refused to sign the form. After Bageris had refused to execute the waiver of rights form and stated that he did not wish to make a statement, Agent Turner directly proceeded to ask Bageris the personal history questions without expressly warning him that any statements made during the taking of the personal history questionnaire could be used by the Government in its case in chief at trial. One of the questions asked of Bageris by Agent Turner during the personal history questionnaire concerned whether Bageris used any drugs. Bageris responded that he did not use drugs of any kind, to which Agent Turner asked as to whether that remark extended to marijuana, to which Bageris replied that he did not use marijuana either.

Bageris was ultimately indicted on April 18, 1975 in an eleven (11) Count Indictment. Seven (7) of the eleven (11) Counts in the Indictment pertained to possession with intent to distribute relatively small quantities of marijuana, with the largest single amount of marijuana being found in Count III of approximately 440.3 grams or just under one (1) pound. Counts V and VI of the Indictment pertained to the possession with intent to distribute cocaine, with the quantities in said Counts being approximately 0.28 grams and 3.28 grams respectively. The remaining two (2) Counts, being Counts IX and X, concerned the possession with intent to distribute relatively small quantities of amphetamines.



After an abortive effort at trial had ended in a mistrial on August 20, 1975, the retrial commenced on September 23, 1975. During the Government's case in chief, the Assistant United States Attorney was conducting his direct examination of Agent Mary Turner concerning the taking of the personal history questionnaire of Bageris after he had been brought down to the Federal Building subsequent to his arrest as described *supra*. An argument ensued as to whether the Government should be permitted to use the statements which Bageris had made during the taking of his personal history questionnaire. The statements in question pertain to the fact that Bageris, in response to a question by Agent Turner, stated that he did not use drugs of any kind whatsoever, including marijuana. The Trial Court ultimately ruled that the Government could use the statements in question.

Also during the Government's case in chief, during the direct examination of Agent Antonucci, Agent Antonucci testified that Bageris was given a waiver of rights form which he read over and then refused to sign. The defense made a motion for mistrial based upon the remark of Agent Antonucci concerning Bageris' refusal to sign the waiver of rights form. The Trial Court denied the motion for mistrial and instructed the jury to disregard the remark.

At the conclusion of the Government's case in chief, the defense made a Motion for Judgment of Acquittal, and argument ensued thereon. After hearing argument on the Motion for Judgment of Acquittal, the Trial Court denied the same as to each of the eleven (11) Counts in

the Indictment, basing its decision in large part on the statements of Bageris taken during the personal history questionnaire that he did not use drugs of any kind whatsoever.

After the Government had rested its rebuttal case, the Assistant United States Attorney gave his closing argument or summation to the jury. After the summation of the defense, the Assistant United States Attorney made his rebuttal argument to the jury. In both the initial summation and the rebuttal argument of the Assistant United States Attorney, references were made to Bageris' statements taken during his personal history questionnaire that he did not use drugs of any kind whatsoever, including marijuana, as going to the point that the controlled substances were allegedly being held for distribution, as opposed to simple possession.

After the Trial Court had instructed the jury, the jury ultimately returned with a verdict of not guilty as to Count I of the Indictment, and guilty as to the remaining Counts of the Indictment. The defense filed a Motion to Dismiss, or in the Alternative, for Judgment of Acquittal, or for New Trial, together with a Supplemental Motion for New Trial. After the Trial Court denied all of the post trial motions of Bageris, a timely Notice of Appeal was filed with the United States Court of Appeals for the Sixth Circuit. On May 24, 1977 the Sixth Circuit entered an Order affirming the Judgment of Conviction. Bageris filed a timely application for rehearing in the Sixth Circuit which was denied in an Order dated July 1, 1977.



## REASONS FOR ALLOWANCE OF THE WRIT

### I

In *Miranda* v. *Arizona,* 384 U.S. 436 (1966), this Honorable Court promulgated certain procedures to be followed as applied to custodial interrogation in order to protect the constitutional privilege against compulsory self-incrimination pursuant to the Fifth Amendment of the United States Constitution. The present Petition involves the procedures to be employed when the Government seeks information on a personal history questionnaire ostensibly designed to elicit information for the Government's bookkeeping purposes. As will be shown *infra,* the present appeal contains elements of the following considerations governing review on *certiorari* pursuant to Rule 19 of the rules of this Honorable Court: First, that the decision of the United States Court of Appeals for the Sixth Circuit would appear to be in conflict with similar cases in the United States Courts of Appeals for the Second, Fifth and District of Columbia Circuits; second, that the decision of the Sixth Circuit has decided an important question of Federal Constitutional law, namely the proper procedures to be employed in taking personal history questionnaires, which has not been, but should be, settled by this Honorable Court; third, that the decision of the Sixth Circuit would appear to be in conflict with the applicable decisions of this Honorable Court, namely *Miranda* v. *Arizona, supra,* and *Michigan* v. *Mosley,* 423 U.S. 96 (1975).

With regard to a conflict in the various Courts of Appeals, the Sixth Circuit, in the present matter, has apparently taken the position that the Government is permitted to ask questions of a criminal defendant without first expressly warning that the answers given may be used by

the Government in their case in chief, and further, that the questions asked may pertain to the criminal activity itself. Since Bageris had been arrested for suspected violations pertaining to controlled substances, the questions on the personal history questionnaire pertaining to usage of drugs do indeed pertain to the very area of criminal activity for which the Defendant was arrested. In counsel's research, no other Federal Court of Appeals has permitted the Government to ask a personal history questionnaire containing questions which pertain to the criminal activity for which the defendant was arrested, without requiring the Government to expressly warn that any answers given may be used in the Government's case in chief at trial.

In contrast to the decision of the Sixth Circuit in the present matter, the decision of the Fifth Circuit in *United States* v. *Menichino,* 497 F.2d 935 (5th Cir. 1974), indicates that the Fifth Circuit would not have permitted the Government to introduce the statements in question in the present matter. In *Menichino, supra,* the defendant was advised of his constitutional rights and refused to sign a waiver of rights form as parallels the factual situation in the present matter. Menichino was then asked biographical questions, and during the taking of the personal history information, Menichino volunteered incriminating statements which were not in response to a biographical question. The Fifth Circuit held that the volunteered incriminating statements were admissible because the biographical questions themselves did not lend themselves to eliciting damaging statements. Furthermore, the interrogation appeared to have been a straightforward attempt to secure biographical data necessary to complete booking, and the questions asked did not relate, even tangentially,



to criminal activity. In addition, the Fifth Circuit was careful to point out that the incriminating statements were strictly volunteered, and were not made in response to one of the questions asked during the booking procedure. In contrast to *Menichino, supra,* Bageris was asked questions concerning drug usage, and the incriminating statements were made in direct response to questions concerning drug usage, and were not volunteered as was the case in *Menichino, supra.*

In the decision of the Second Circuit in *United States ex rel Hines* v. *LaVallee,* 521 F.2d 1109 (2d. Cir. 1975), *cert. denied,* 423 U.S. 1090 (1976), the defendant therein, while en route to the police station, without having been given his constitutional rights, informed the arresting officer, in response to questions designed to pass the time by seeking background data, such as name, address, age and marital status, that he had been married eleven years and had two children. The information regarding the length of his marriage and the number of his children later proved to be incriminating because of statements which the defendant had made to the complainant during the commission of the crime.

The Second Circuit held that as long as the questioning is related to the most basic identifying data required for booking and arraignment, the same would be permissible. However, the Second Circuit was quick to point out that its holding was strictly limited to simple identification information of the most basic type such as name, address and marital status. In other words, the clear implication of the decision of the Second Circuit is that any questioning which goes beyond simple identification information of the most basic sort would be impermissible. Since the

questioning of Bageris by Agent Turner in the present matter went far beyond biographical data of the most basic and innocuous type, it is respectfully submitted that the Second Circuit most likely would have suppressed Bageris' statements under its view enunciated in *Lavallee, supra.*

Finally, in the case of *Proctor* v. *United States,* 404 F.2d 819 (D.C. Cir. 1968), the District of Columbia Circuit perhaps went further than any other Circuit has gone in prohibiting the type of questioning which Bageris was subjected to. In *Proctor* v. *United States, supra,* the defendant was arrested and read his constitutional rights, and then was taken to a police station. At the police station, the arresting officer, in the course of filling out a lineup sheet on the defendant, asked the defendant whether he was employed without first once again advising the defendant of his constitutional rights. After the defendant made certain damaging admissions, the District of Columbia Circuit held that the questions which the arresting officer asked Proctor in the course of filling out the lineup sheet constituted custodial interrogation which is improper absent a waiver of constitutional rights in accordance with the doctrine of this Honorable Court in *Miranda* v. *Arizona, supra.* The District of Columbia Circuit conceded that the police officer asked the questions without any intent to elicit statements, damaging or otherwise, bearing on the crime with which the defendant was charged. The Court held that the intent with which the questions were asked is totally irrelevant, and the Court held that where the answers turn out to be damaging to the suspect, they cannot be used at trial absent a valid waiver of constitutional rights.

Since it is recognized that no other Court of Appeals



has gone as far as the District of Columbia Court of Appeals went in *Proctor* v. *United States, supra,* it should be made clear that Bageris is not placing his primary or sole reliance upon the decision in *Proctor, supra.* However, it is respectfully submitted that if this Honorable Court were to take the so-called middle approach as was done by the Second Circuit in *LaVallee, supra,* and the Fifth Circuit in *Menichino, supra,* the statements of Bageris should have been suppressed by the Trial Court for the reasons stated *supra.* Since the statements of Bageris were made in response to a direct question of Agent Turner pertaining to the criminal activity itself, after Bageris had declined to sign a waiver of rights form without the Government expressly warning that the personal history questionnaire was fair game for damaging admissions, the statements should have been suppressed.

It should also be made clear that Bageris has no quarrel *per se* with the proposition that the Government is entitled to take a personal history questionnaire for its bookkeeping purposes. However, Bageris would wish to emphasize that the Government cannot have it both ways since the rationale for permitting the Government to take a personal history questionnaire is that the same is essential for basic bookkeeping records, and is not designed to elicit damaging responses. In short, as soon as the personal history questionnaire contains questions which are related, even tangentially, to the criminal activity itself, or as soon as the Government is permitted to introduce any statements gleaned from the personal history questionnaire in its case in chief, the rationale for permitting the Government to obtain such data vanishes. In other words, if the Government takes the position that the Miranda Warnings did

not have to be readministered prior to the taking of the personal history questionnaire, then it is respectfully submitted that the Government has tacitly admitted that the questioning was solely designed for its bookkeeping purposes, and the Government cannot now change the rules of the games after the game has been played to introduce the statements in its case in chief. On the other hand, if the Government takes the position that the Miranda Warnings should be given prior to the taking of a personal history questionnaire, then it is clear that the Government did not abide by such a procedure since the agent proceeded to take the personal history questionnaire directly following the Defendant's refusal to make a statement and to sign the waiver of rights form. Under *Michigan* v. *Mosley, supra,* the very least that the Government could have done after Bageris had indicated a refusal to make a statement coupled with a refusal to sign a waiver of rights form would have been to cease questioning for a period of time and then readminister the Miranda Warnings directly prior to the taking of the personal history questionnaire as is outlined in *Michigan* v. *Mosley, supra.*

With regard to the reason for allowance of the Writ that the Sixth Circuit decided an important question of Federal law which has not been, but should be, settled by this Honorable Court, it is respectfully submitted that the proper method for the Government to take a personal history questionnaire is of vital significance to the administration of criminal justice. It would not be an exaggeration to state that police authorities attempt to obtain biographical information of one kind or another in the vast majority of arrests which are conducted throughout the various fifty states and throughout the various Federal Courts. The



fact that the Second Circuit, the Fifth Circuit, the District of Columbia Circuit, and the Sixth Circuit have all spoken to the general area of personal history questionnaires indicates that the taking of biographical data is indeed an important matter in the administration of criminal justice. Moreover, it is respectfully submitted that this Honorable Court has always recognized that it has a continuing duty to delineate the parameters and boundaries of the decision of this Honorable Court in *Miranda* v. *Arizona, supra.* To the best of counsel's research, it does not appear as if this Honorable Court has ever ruled on the proper procedures to be followed in the taking of a personal history questionnaire.

With respect to the final reason for allowance of the Writ, it would appear as if the decision of the Sixth Circuit in this matter is in conflict with the decisions of this Honorable Court in *Miranda* v. *Arizona, supra,* and *Michigan* v. *Mosley, supra.* In *Miranda* v. *Arizona, supra,* this Court held that a heavy burden rests upon the Government to demonstrate that the Defendant knowingly and intelligently waived his privilege against self-incrimination. As stated *supra,* Bageris was orally given his constitutional rights and handed a waiver of rights form, at which time he stated that he did not wish to make a statement and refused to sign the waiver of rights form. Directly following Bageris' refusal to make a statement and to execute the waiver of rights form, Agent Turner proceeded to directly question Bageris concerning the personal history questionnaire without expressly warning him that any statements made during the course of the personal history questionnaire could be used against him at trial. Since Bageris was never expressly warned that his statements during the biographi-

cal questioning could be used against him at trial, it is respectfully submitted that the Government had failed to discharge its heavy burden to demonstrate that Bageris knowingly and intelligently waived his privilege against self-incrimination with respect to the personal history questionnaire. At the very least, the Government should be required to expressly warn a criminal defendant that his answers during the personal history questionnaire can be used against him at trial since the Government seeks to justify the biographical questioning on the purported basis that it is to be used strictly for bookkeeping purposes, and not for developing evidence at trial.

Moreover, pursuant to the doctrine of this Court enunciated in *Michigan* v. *Mosley, supra,* the Government most likely should have ceased questioning Bargeris for a period of time after he had orally indicated that he did not wish to make a statement coupled with his refusal to execute the waiver of rights form. The decision of this Court in *Michigan* v. *Mosley, supra,* was careful to point out that the readministration of the Miranda Warnings after a decent interval of time has passed may be sufficient to discharge the Governement's heavy burden that the defendant knowingly and intelligently waived the privilege against self-incrimination. Conversely, it is respectfully submitted that if the Government fails to readminister the Miranda Warnings and also fails to cease questioning for a short time, then the result should be that the Government has not discharged its heavy burden.

## II

In *Doyle* v. *Ohio,* — *U.S.* —, 96 S.Ct. 2240 (1976), and in *United States* v. *Hale,* 422 U.S. 171 (1975), this Honorable



Court established a rule that the Government cannot use the silence of a defendant after he has been warned of his constitutional rights for any purpose, including impeachment. Despite the clear mandate of this Court that the silence of a defendant following the administration of his constitutional rights cannot be used in any form at trial, a Governmental agent at trial made reference to the fact that after Bageris was advised of his constitutional rights, he declined to sign the waiver of rights sheet.

After the agent had commented that Bageris had refused to sign the waiver of rights sheet after being informed of his constitutional rights, the defense immediately made a motion for mistrial based upon said remark. The defense further pointed out to the Trial Court that the earlier trial of Bageris had resulted in a mistrial due to the same agent's statement that Bageris had declined to make a statement after being read his constitutional rights. In denying the motion for mistrial, the Trial Court drew a distinction between the earlier situation in which the agent had stated the no statement was made, as opposed to the situation where the agent stated that there was a refusal to execute the waiver of rights form. The Trial Court did instruct the jury that Bageris was under no duty or obligation to sign the waiver of rights form.

Since the context of the agent's remarks concerning Bageris' refusal to execute the waiver of rights form immediately followed upon the agent's statement that Bageris was advised of his constitutional rights, the only logical inference that could be drawn by the jury from the refusal of Bageris to sign the waiver of rights sheet was that he was exercising his Fifth Amendment privilege against self-incrimination by choosing to remain silent. Since the earlier trial of Bageris had ended in a mistrial due to the remark

of the agent that Bageris had declined to make a statement, it is difficult to understand how the comment concerning the refusal to execute the waiver of rights sheet constituted any less of a comment upon the exercise of the constitutional privilege against self-incrimination than did the remark in the earlier trial.

In *Chapman* v. *California,* 386 U.S. 18 (1967), this Court held that unless a comment upon the exercise of the Fifth Amendment privilege against self-incrimination could be construed as harmless beyond all reasonable doubt, a new trial must be ordered. Although it is recognized that the Trial Court did instruct the jury that Bageris did not have a duty or obligation to sign the waiver of rights sheet, it is respectfully submitted that such an instruction merely emphasizes the fact that Bageris had exercised his constitutional right to remain silent. As stated *supra,* the context of the remark was especially damaging in that it came immediately following the agent's testimony that Bageris was warned of his constitutional rights. Therefore, the failure of the Sixth Circuit to reverse Bageris' conviction based upon the improper comment by the agent concerning the exercise of his privilege against self-incrimination constitutes a decision which is not in accordance with the decisions of this Honorable Court in *United States* v. *Hale, supra, Doyle* v. *Ohio, supra,* and *Chapman* v. *California, supra.*



## CONCLUSION

For the foregoing reasons, Petitioner, Robert P. Bageris, respectfully urges this Honorable Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
/s/ IVAN E. BARRIS (P-10484)
/s/ MICHAEL H. GOLOB (P-23118)
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Dated: July 13, 1977.

## APPENDIX A

### UNITED STATES DISTRICT COURT

Eastern District of Michigan

United States of America vs.
ROBERT PETER BAGERIS
Filed December 3, 1975 Docket No. 4-82722

In the presence of the attorney for the government the defendant appeared in person on this date: 12/03/75.

With Counsel: Ivan E. Barris

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offenses of Count 2, 3, 4, 7, 11 — Possession with Intent to Distr. Marihuana 21:USC:841(a)(1); Counts 9 & 10 — Poss. with Intent to Distribute Amphetamines; 21:USC:841(a)(1); Counts 5 & 6 — Possession with Intent to Distribute Cocaine 21:USC:841(a)(1); Count 3 — Simple Possession of Marihuana in Vio: 21:USC:844

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

Count 2 — one (1) year plus three (3) years Special Parole and a FINE in the amount of two hundred and fifty dollars ($250.00)

Counts 3, 4 & 7 — one (1) year and three (3) years SPT and FINE in the amount of one thousand dollars ($1,000.00) on each Count.

Count 11 — one (1) year plus three (3) years SPT and one hundred dollar ($100.00) FINE

Count 5 — three (3) years plus three (3) years SPT and FINE in the amount of one thousand dollars ($1,000.00)

Count 6 — three (3) years plus 3 years SPT and FINE in the amount of two thousand dollars ($2,000.00)

Count 8 — three (3) months and two hundred dollar ($200.00) FINE

Counts 9 & 10 — three (3) years plus three (3) years SPT and FINE in the amount of one thousand dollars ($1,000.00) on each Count.

All Counts as to imprisonment portion only are to run concurrent.

TOTAL FINE: eight thousand five hundred and fifty dollars ($8,550).

Defendant's bond is continued pending appeal.

## APPENDIX B

No. 76-2573

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT PETER BAGERIS,
Appellant.

### ORDER

Before PHILLIPS, Chief Judge, ENGEL, Circuit Judge, and RUBIN, District Judge.*

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*Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.



Robert Peter Bageris appeals from his jury conviction in the United States District Court for the Eastern District of Michigan on ten of eleven counts charging various violations of the narcotics laws, 21 U.S.C. § 841 (a)(1).

After his arrest, Bageris was taken to the Federal Building in Detroit for booking. He was read his *Miranda* rights and indicated that he did not wish to make a statement. Thereafter, two agents conducted a "personal history questionnaire" in which they asked routine questions concerning such matters as his age, marital status and health. At one point the agents inquired whether Bageris used drugs and he answered in the negative. He told the agents that he did not use any drugs, including marijuana. At trial this statement was introduced by the Government in support of the charge that the possession of drugs by Bageris was with intent to distribute, since he was not a user. It is contended that this procedure violated appellant's fifth amendment rights. We hold this contention to be without merit. Smith v. United States, 505 F.2d 824, 829 (6th Cir. 1974); Hill v. Whealon, 490 F.2d 629 (6th Cir. 1974).

Other arguments for reversal are that the district court erred in not suppressing evidence obtained during the search of appellant's apartment on the ground that the affidavit in support of the warrant was insufficent to establish probable cause; and that testimony of Agent Antonucci was so prejudicial as to require a mistrial. These and all other contentions made on behalf of Bageris have been considered and found to be without merit.

Accordingly, it is ORDERED that the judgment of the District Court be and hereby is affirmed.

Entered by order of the court.

/s/ JOHN A. HELM
Clerk

## APPENDIX C

(Title of Court and Cause)

ORDER DENYING PETITION FOR REHEARING

Before PHILLIPS, Chief Judge, ENGEL, Circuit Judge, and RUBIN, District Judge.*

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ JOHN A. HELM
Clerk

## APPENDIX D

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

Penalities

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United

*Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.



States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

No. 77-217



# In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT P. BAGERIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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BENJAMIN R. CIVILETTI,
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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The order of the court of appeals (Pet. App. 2a-3a) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on May 24, 1977. A petition for rehearing was denied on July 1, 1977. The petition for a writ of certiorari was filed on August 4, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner, by failing to move to suppress before trial, waived his objection to the use in evidence of a statement he made to arresting offices during routine booking procedures.

2. Whether petitioner is entitled to a new trial because a government witness stated that petitioner had refused to sign a waiver of rights form, where the jury was immediately admonished to disregard that statement.

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possession of marihuana (five counts), amphetamines (two counts), and cocaine (two counts), all with intent to distribute, and on one count of simple possession of marihuana, in violation of 21 U.S.C. 841(a)(1) and 844.[1] He was sentenced to one year's imprisonment and three years' special parole on each of the five marihuana counts, to three months' imprisonment on the simple possession of marihuana count, to three years' imprisonment and three years' special parole on each of the remaining counts, and to fines totalling $8,550 (Pet. App. 1a-2a). The sentences of imprisonment were to be served concurrently (*ibid.*). The court of appeals affirmed (Pet. App. 2a-3a).

On September 19, 1974, agents of the Drug Enforcement Administration executed a search warrant for the premises occupied by petitioner. During the search they seized marihuana, amphetamines and cocaine and arrested petitioner.

[1]An earlier trial of petitioner had resulted in a mistrial (Pet. 5).



At trial the government attorney asked one of the DEA agents who had participated in the booking procedures following petitioner's arrest if petitioner had been asked during those proceedings whether he used narcotics (A. 44a-45a).[2] Defense counsel then requested that the matter be taken up outside the presence of the jury (A. 45a). The jury was excused, and defense counsel objected to the admission of any testimony regarding statements made by petitioner during the booking process (A. 48a). The district court observed that the issue had not been raised in petitioner's pretrial motions to suppress, that petitioner's first trial had ended in a mistrial because of "the personal history problems," and that counsel could not claim surprise with regard to the testimony the government sought to introduce (A. 47a). The court then heard argument from counsel and ruled that the testimony was admissible, noting that the agent conducting the booking proceedings had warned petitioner of his *Miranda* rights and that, under the circumstances, it would not entertain a midtrial motion to suppress (A. 50a). The court did, however, allow defense counsel to conduct a *voir dire* examination of the government's witnesses (*ibid.*).

During the *voir dire*, a DEA agent testified that petitioner was given *Miranda* warnings when he was arrested (A. 46a, 53a). He was then taken to the DEA office, where he was again advised of his rights and given a waiver of rights form. Petitioner declined to sign the form and stated that he did not wish to make a statement (*ibid.*). Petitioner was then photographed, fingerprinted, and asked routine questions read to him from a personal

[2]"A." refers to petitioner's appendix on appeal, a copy of which we have lodged with the Clerk of this Court.

history form (A. 44a-45a). The questions on the form related to the arrestee's name, address, identifying data, residence, and educational background, the names and addresses of family members, the arrestee's use, if any, of narcotics, and his or her "characteristic marks or conditions" (A. 45a). In response to the questions about narcotics, petitioner stated that he used no drugs, "[n]ot even marijuana" (A. 67a). When the jury returned, that statement was admitted into evidence as proof of petitioner's intent to distribute the 863.11 grams of marijuana discovered during the search of his house.[3]

## ARGUMENT

1. Petitioner contends (Pet. 7-14) that the statements made by him following his arrest were obtained in violation of the principles of *Miranda* v. *Arizona*, 384 U.S. 436, and therefore should have been suppressed. Petitioner did not, however, raise this claim in a timely fashion in the district court, and he is therefore not entitled to have it considered now.

Although petitioner was aware prior to trial of any facts that might have tended to support his allegations (see A. 48a), he did not complain of improper custodial interrogation in the suppression motions that he filed, each of which sought suppression of the evidence seized during the search of his home.[4] Accordingly, no evidence presented at the suppression hearings (A. 1a-44a) touched

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[3]See Counts 1-4, 7, and 11 of the indictment (A. 195a-197a); 863.11 grams equals nearly two pounds.

[4]Petitioner's motions to suppress complained of the alleged insufficiency of the affidavit in support of the search warrant (A. 201a-205a), alleged defects on the face of the affidavit and in the warrant, and the conduct of the agents during the execution of the warrant (A. 230-238). He does not present those claims here.



upon the circumstances surrounding the booking procedures. Under the pertinent Rules of Criminal Procedure in effect at the time of petitioner's trial, a motion to suppress prosecution evidence must be made prior to trial.[5] Petitioner neither made such a motion nor demonstrated good cause for failing to do so, and accordingly he must be deemed to have waived his challenge.[6]

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[5]The provisions in effect at petitioner's trial were former Rules 41(f) and 12, Fed. R. Crim. P. While the language of those provisions was not as explicit as the current Rules, they had consistently been held to state essentially the same requirement. See, *e.g.*, *United States* v. *Mauro*, 507 F. 2d 802, 807 (C.A. 2), certiorari denied, 420 U.S. 991; *United States* v. *Farnkoff*, 535 F. 2d 661 (C.A. 1); *United States* v. *Sisca*, 503 F. 2d 1337, 1349 (C.A. 2), certiorari denied, 419 U.S. 1008; *United States* v. *Ceraso*, 467 F. 2d 653, 659 (C.A. 3); *United States* v. *Peterson*, 524 F. 2d 167, 170 (C.A. 4), certiorari denied, 423 U.S. 1088. Cf. *United States* v. *Barber*, 495 F. 2d 327 (C.A. 9). See generally *Segurola* v. *United States*, 275 U.S. 106, 112. Although under the old rules the district court would have had discretion to excuse petitioner from the consequences of his waiver, that was not done in this case. This discretion no longer exists. See Fed. R. Crim. P. 12(b)(3) and 12(f).

[6]Petitioner correctly notes that the decision of the District of Columbia Circuit in *Procter* v. *United States*, 404 F. 2d 819, is at odds with the decisions of other courts of appeals regarding the propriety of the government's asking routine booking questions of a defendant who, after having received *Miranda* warnings, has refused to discuss the crime for which he has been arrested. See, in addition to the decision below, *United States* v. *Prewitt*, 553 F. 2d 1082 (C.A. 7), certiorari denied, October 3, 1977 (No. 76-6665); *United States* v. *Grant*, 549 F. 2d 942, 946 (C.A. 4), certiorari denied, June 20, 1977 (No. 76-6463); *United States ex rel. Hines* v. *LaVallee*, 521 F. 2d 1109, 1112-1113 (C.A. 2), certiorari denied *sub nom. Hines* v. *Bombard*, 423 U.S. 1090; *Morrison* v. *United States*, 491 F. 2d 344, 345 (C.A. 8); *United States* v. *La Monica*, 472 F. 2d 580 (C.A. 9); *Farley* v. *United States*, 381 F. 2d 357, 359 (C.A. 5), certiorari denied, 389 U.S. 942; see also *United States* v. *Martinez*, 512 F. 2d 830, 833 (C.A. 5); *Smith* v. *United States*, 505 F. 2d 824 (C.A. 6). Cf. *United States* v. *Menichino*, 497 F. 2d 935, 940-941 (C.A. 5). Our view is that, especially in cases such as this one, where the arrestee was given

2. During the direct examination of one of the DEA agents involved in the arrest and processing of petitioner, the following colloquy occurred (A. 68a):

> A. After the search was completed, we took [petitioner] down to our office in the Federal Building, fingerprinted, photographed him and took a personal history sheet.
>
> Q. By we, who do you mean, sir—
>
> * * * * *
>
> A. Myself, Agent Turner and Agent Stepp were involved in the processing of [petitioner].
>
> Q. (By Mr. Sharp, continuing): And what, exactly, was your assignment in the processing of [petitioner]?
>
> A. When we first arrived in the office, took [petitioner] to our processing area and our lock-up. I advised [petitioner], again, of his Constitutional rights.
>
> [Petitioner] was then given a waiver of rights sheet which he read over and he refused to sign it.
>
> MR. BARRIS [defense counsel]: Your Honor, I think—may we have the jury excused, please.

After the court had excused the jury, defense counsel moved for a mistrial on the ground that the agent's testimony amounted to an impermissible comment on petitioner's exercise of his Fifth Amendment privilege

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full *Miranda* warnings at the time of arrest and again at the DEA office, law enforcement officials may properly ask routine booking questions that have legitimate, noninvestigative purposes relating to the proper custody and management of the arrestee. Cf. *South Dakota* v. *Opperman*, 428 U.S. 364; *Cady* v. *Dombrowski*, 413 U.S. 433.



against compulsory self-incrimination. The government attorney conceded that "the comment was unfortunate" (A. 69a) but argued that it was dissimilar to the testimony that had caused petitioner's first trial to end in a mistrial (then a government witness testified that petitioner had indeed exercised his privilege and had refused to make any statement (*ibid.*)). Defense counsel agreed that the situations were dissimilar (*ibid.*), but he argued that the agent's testimony about petitioner's refusal to sign the waiver form was irrelevant and possibly prejudicial to petitioner (*id.* at 69a-70a). The district court then stated that the government attorney's question of the witness had not been designed to elicit the testimony to which defense counsel objected (*id.* at 70a-71a):

> THE COURT: The question did not include that; the answer went beyond the question. I don't see anything improper with the question. I think the question was essentially, particularly in the defendant's view, as to what would be done and I think the matter could be covered by instructing the jury that there is no obligation by anyone to sign that form and I intend to so instruct them.
>
> MR. SHARP: Thank you, your Honor.
>
> MR. BARRIS: Thank you.
>
> THE COURT: Will you be very cautious, Mr. Antonucci [the DEA agent], to answer Mr. Sharp's questions and not include any more than he asks you. These are areas that are very difficult. If he has to ask you a leading question, I would permit him to do so. I would prefer to have a leading question- - - and you may not recognize, as a witness, from what happened before, you're not a lawyer, but will you be cautious in that respect?

MR. BARRIS: I assume your Honor is denying the motion?

THE COURT: I'm denying the motion. I'm going to tell the jury there is no obligation for anyone to sign the form without indicating what the form is.

MR. BARRIS: Thank you, your Honor.

The jury was then recalled and the district court instructed it that "there is absolutely no obligation or requirement that any person sign the form which the witness just referred to. There's no obligation on him or requirement, at all, that he sign any such form" (*id.* at 71a).

Contrary to petitioner's argument (Pet. 14-16), the agent's brief remark (A. 68a) that petitioner was "given a waiver of rights sheet which he read over and he refused to sign it" did not deprive petitioner of a fair trial. While petitioner is correct in stating that *Doyle* v. *Ohio*, 426 U.S. 610, and *United States* v. *Hale*, 422 U.S. 171, forbid the government from discrediting the defendant's trial testimony with evidence of his silence at the time of arrest (and after having received *Miranda* warnings), we submit that those cases are inapposite here, where the testimony to which petitioner objects was not deliberately elicted by the government attorney and was not used to establish any material element of the prosecution's case or to impeach his own testimony (petitioner did not testify at trial). Nor does *Griffin* v. *California*, 380 U.S. 609, forbidding comment on the defendant's exercise of his Fifth Amendment privilege, require reversal here. The agent's testimony about petitioner's refusal to sign the waiver form amounted to no more than one isolated, inadvertent remark that, when taken in the context of the entire trial—which included evidence of petitioner's possession of the marihuana, cocaine, and amphetamines



found in his house, as well as the district court's immediate curative instruction—was harmless beyond a reasonable doubt. See *Milton* v. *Wainwright*, 407 U.S. 371.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

DOJ-1977-12

No. 77-217

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

Court of Appeals No. 76-2573

ROBERT P. BAGERIS, Petitioner

vs.

UNITED STATES OF AMERICA

# REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## COUNTER-STATEMENT OF JURISDICTION

Under its statement entitled "Jurisdiction", the Government has contended that the Petition for Writ of Certiorari was filed on August 4, 1977, and

was therefore out of time pursuant to Rule 22(2) of the Rules of this Honorable Court. As Assistant Clerk Ms. Jennie H. Lazowski can confirm, the Defendant's Petition for Writ of Certiorari was mailed from Detroit, Michigan in a package marked "Special Handling", and postmarked on July 28, 1977. When the package containing the Petition for Writ of Certiorari eventually arrived at the United States Supreme Court on August 4, 1977, it was marked as being damaged in transit and had to be rewrapped at the United States Post Office in Washington, D.C. It is respectfully submitted that since one arm of the United States Government, namely the United States Postal Service, damaged the package containing the Petition for Writ of Certiorari so that it ultimately arrived later



then its postmark of July 28, 1977 indicated, a different arm of the Government, namely the Solicitor General's Office, should not be permitted to claim untimeliness in the filing of the Petition for Writ of Certiorari. Moreover, the Solicitor General's Office has disregarded two express directives from this Honorable Court as to when its Reply Brief should have been filed, and it is respectfully submitted that it is ironical to now have the Solicitor General's Office contend that the Defendant's Petition was untimely filed in light of their own untimely conduct in filing their Reply Brief in this matter.

## REPLY QUESTIONS PRESENTED

1. Is the Government correct in contending that the Petitioner, by failing to move

to suppress the personal history statements prior to trial, waived his objection to the use in evidence of the statements he made to the arresting officers during the booking procedures.

## REPLY ARGUMENT

In its Reply Brief, the Government has contended that the Petitioner waived his right to contest the admisibility of the personal history statements by failing to file a pretrial motion to suppress said statements. Initially, it should be pointed out that the Sixth Circuit, in affirming the Petitioner's conviction, did not base its decision in whole or in part upon the alleged untimeliness of the Petitioner to file a pretrial motion to suppress.



Moreover, the cases cited by the Government for the proposition that the Petitioner should have filed a pretrial motion to suppress the statements obtained during the personal history questionnaire are not applicable to the issues involved since the cases cited by the Government primarily involve attacks upon search warrants and evidence seized resulting therefrom.

The Government has also failed to recognize the distinction between statements which are inculpatory on their face, and those which are exculpatory on their face such as the ones under attack in the present appeal, namely that the Petitioner did not use drugs of any kind whatsoever, including marijuana. Prior to December 1, 1975, the effective date of the current Rule 12(b)(3)

of the Federal Rules of Criminal Procedure, it was clear that under the prior Rule 12 which was in effect at the time of the Petitioner's trial, objections to statements which were not inculpatory or confessions on their face did not have to be made prior to trial. As stated in Moore's Federal Practice, Rule 12 of the Federal Rules of Criminal Procedure was substantially amended, effective December 1, 1975, to provide that motions to suppress evidence must be made prior to trial. Furthermore, Rule 12 was also amended to provide a mechanism so as to permit a defendant to learn in advance of trial of the Government's intention to use evidence which might be the target of a motion to suppress, but not readily apparent on its face, such as a statement which is exculpatory in nature on its face



but will be used by the Government in its case in chief at trial in an inculpatory fashion.

> "Rule 12 was substantially amended effective December 1, 1975. Subdivision (b) was amended to provide that motions could be made orally or in writing, at the discretion of the judge, and added the following remedies that must be sought prior to trial: motions to suppress evidence; . . . Among other amendments was the addition of a mechanism (see Rule 12(d)(1)) permitting a defendant to learn, in advance of trial, of the government's intention to use evidence which might be the target of a motion to suppress."
> 8, Moore's Federal Practice, pages 12-3 to 12-4.

> "Rule 12(b)(3), dealing with motions to suppress, makes it clear that any objections to evidence predicated on the ground that it was illegally acquired must be made before trial. This is in accord with the

present practice pertaining to illegal searches and illegally obtained confessions . . ."
8, Moore's Federal Practice, page 12-21.

"Subdivision (d) was added to Rule 12 in the 1975 amendments and is effective December 1, 1975. Rule 12(d) allows a defendant to ascertain the government's intention regarding the use of evidence which may be the object of a motion to suppress. The new subdivision complements the addition in Rule 12(b)(3) that motions to suppress evidence must be raised prior to trial . . ."
8, Moore's Federal Practice, pages 12-34 to 12-35.

As can be seen from the portions of Moore's Federal Practice quoted supra, Rule 12 that was in effect at the time of Petitioner's trial only required motions to suppress to be made prior to trial if the same pertained to illegal searches and illegally obtained confessions. Since the



statements of Petitioner in question were exculpatory on their face, and not confession-type statements, Petitioner had no duty to bring said motion prior to trial. Moreover, the defense had no mechanism similar to Rule 12(d) of the current Federal Rules of Criminal Procedure to permit the defense to know in advance of trial the precise type of evidence that the Government intended to introduce in its case in chief. Moore's Federal Practice explicitly states that Rule 12(d) was added so that the defense could be made aware of any evidence which should be subject to a motion to suppress prior to trial. Conversely, since there was no Rule 12(d) at the time of Petitioner's trial, there was likewise no duty on the part of Petitioner to look into a crystal ball and read the Government's mind in order to

determine what evidence the Government was intending to introduce in its case in chief.

In conclusion, Rule 12(b)(3) of the Federal Rules of Criminal Procedure, effective December 1, 1975, substantially altered the law that was in existence at the time of Petitioner's trial as it pertained to motions to suppress. Under the law existing at the time of Petitioner's trial, motions to suppress evidence only had to be brought prior to trial if the same pertained to illegal searches and seizures and to illegally obtained confessions. Since the statements in question from the personal history questionnaire were certainly exculpatory on their face, Petitioner had no duty to bring a motion to suppress prior to trial, and the Government has erroneously based its argument on the alleged



untimeliness of Petitioner's Motion as a basis for denying the Petition for Writ of Certiorari.

Respectfully submitted,

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